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In The

SUPREME COURT OF THE UNITED STATES

No. 74-237

TEAMSTERS LOCAL UNION 377
Petitioner,

vs.

WILLIAM SCOTT
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF WILLIAM SCOTT IN OPPOSITION

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BRIEF OF WILLIAM SCOTT IN OPPOSITION

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Is an appeal of an order granting a new trial premature, when there is as yet no final judgment of damages?
2. May a plaintiff who is a victim of wrongful discharge and unfair representation recover from the union his litigation expenses, including attorney fees, incurred in collecting damages from the employer?
3. When a union acting in bad faith fails to process a meritorious grievance, is it liable for the damages proximately caused by its unfair representation?

STATEMENT OF THE CASE

Respondent William Scott (plaintiff) brought suit alleging that he was discharged without just cause in breach of the labor agreement between Anchor Motor Freight Co. (the employer) and Petitioner Teamsters Local 377 (the union), and that the union failed to provide fair representation with respect to his grievance.

The record shows that the employer disliked Scott because he filed many pay claims and complaints and was an alleged "troublemaker" (222-229, 619, 491).[1] For these reasons, the company attempted to use Scott's medical history as a mild diabetic to discharge him. Although Scott had twice been certified by the company doctor as a qualified driver (229, 602-604), the employer improperly coerced and pressured the doctor to change his professional opinion and to issue a disqualifying report, in complete contravention with medical knowledge (483-484, 634). In sum, there was substantial evidence that the discharge was pretextual and in flagrant violation of the mandates of the labor agreement.

In accordance with normal practice (127, 128), Scott filed a grievance with the union by certified mail and requested that the union arrange a hearing (621, 528, 532). Union officials verbally acknowledged receipt of the grievance and promised a hearing (151, 154, 155, 238, 313). However, the union failed to file or process the grievance and further refused to obtain a hearing, all without any stated reason (212, 541, 122-23).

There was evidence of personal hostility on the part of the union's top official John Angelo towards Scott and his

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[1] References are to the pages of the trial transcript reproduced in the joint appendix in the Court of Appeals.

fellow drivers from Southern Ohio, whom he called "hillbillies." (233, 542).

The union's bad faith representation of Scott was part of a pattern of unfair representation of Anchor drivers. There was evidence of a collusive relationship between company and union. The company did favors for union officials by hiring their relatives and by arranging for the loan and purchase of autos (62, 63, 114, 115). The union returned the favors by adopting, without protest, a "sweetheart", illegal, pre-hire rider negotiated when there were no drivers on the payroll and by providing virtually no union representation during the period May 1 to August 19, 1966. At the time of Scott's discharge, there was no union steward, no union grievance committee, and no procedures established for implementing the contractual grievance procedure (209, 399, 471, 543).

The union deceived Scott into believing it was going to help him, yet made no investigation of his case, never reviewed the applicable documents, and secretly acquiesced in the company's version of the case without any communication with Scott (122-123, 279, 519). At the trial, the union did not help Scott but rather vigorously resisted his claims against the employer for wrongful discharge; and all grievances and correspondence from Scott to the union were mysteriously missing from the union files subpoenaed to court (113, 534).

In special verdicts, the jury found the employer had discharged plaintiff without just cause; that plaintiff properly filed his notice of appeal within contractual time limits; and that the union breached its duty of fair representation. The plaintiff produced much evidence showing that the union's unfair representation had not only increased plaintiff's damages over and above damages caused by the employer but also made it more difficult for plain-

tiff to collect damages from the company. The jury returned a verdict of $12,500 against the union.

Plaintiff opted to seek attorneys fees as part of costs, rather than as part of damages at law.[2] The court granted his pretrial motion to amend the complaint which stated plaintiff's intent to bring the matter of attorney fees to the court's attention after the trial, through the invocaion of the court's historic equitable powers. However, the trial court denied plaintiff's post-trial motion for fees, holding that the damage award of $12,500 was full compensation for "expenses of collection."

Scott appealed from the trial court's refusal to grant fees. The Court of Appeals reversed the order denying fees, reversed the damage award against the union as speculative, and remanded the issues of damages, including attorney fees, for a new trial.

In this appeal the union does not contest the finding that Scott was discharged unjustly, and does not contest that the union acted in bad faith in its handling of the grievance. The union's major contention is that the court erred in granting a new hearing on the issue of damages including attorney fees.

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[2] When a suit for 8(b)(1)(a) violation against the union and a claim for breach of contract against the employer under Section 301 are consolidated for jury trial as in the Scott case, it may be difficult to assess the attorneys fees chargeable to the union, since at that point there has been no recovery. A post trial motion for fees may be more appropriate. However, when the case proceeds alone against the union and the amount of damages collected from the employer has been liquidated at time of trial, as will be the case upon remand in the case at bar, it is appropriate to introduce evidence of fees as part of damages.

ARGUMENT

1. THIS APPEAL FROM AN ORDER GRANTING A NEW TRIAL IS PREMATURE SINCE THERE HAS BEEN NO FINAL JUDGMENT OF DAMAGES AGAINST PETITIONER.

At present, there is no judgment against the union, which conceeds that its only present detriment is the necessity "to bear the risk and expenses of another trial." (p. 14 petitioner's brief). Yet it is hornbook law that the granting of a new trial is not an appealable order and that any appeal must await the result of the new trial. The rule is summarized in 9 *Moore's Federal Practice* ¶ 110.11 (2d ed. 1973): "an order adjudging liability but leaving damages to be subsequently determined by a master or by some other mode of trial has not finally determined the action and normally lacks finality."

Leading cases which set forth the rule that an order adjudging liability but remanding the case for a new hearing on damages is not final and not appealable are *Martinez* v. *International Banking Corp.*, 220 U.S. 214 (1911); *Western Geophysical Co. of Am., Inc.* v. *Bolt Associates, Inc.*, 463 F.2d 101 (2nd Cir. 1972), cert. denied 409 U.S. 1040; *Taylor* v. *Board of Education, etc.*, 288 F.2d 600 (2nd Cir. 1961); *Petrol Corporation* v. *Petroleum Heat & Power Co.*, 162 F.2d 237 (2nd Cir. 1947); *Leonidakis* v. *International Telecoin Corp.*, 208 F.2d 934 (2nd Cir. 1953).

Although it is true that technically the Supreme Court of the United States has more discretion in ruling upon petitions for certiorari than in appeals, this Court has shown great reluctance to review a judgment that is less than final, see generally, C. Crick, *The Final Judgment*

as a Basis for Appeal, 41 Yale L. Rev. 539 at 556 (1932). In *Brotherhood of L. F. & E.* v. *Bangor & A.R.C.,* 389 U.S. 327 (1967), the court denied certiorari in a per curiam opinion, where the Court of Appeals had ruled on various issues presented and remanded the case to the District Court to consider other points in regard to contempt and the amount of fine to be imposed. The Court noted ". . . because the Court of Appeals remanded the case, it is not yet ripe for review by this court." Id. at 328. This decision would seem to support the applicability of the final judgment rule to certiorari.

This salutory principle is particularly applicable in the case at bar. The evidence concerning damages, fees and expenses and applicable law concerning the amount due to plaintiff will only be fully developed after trial below and after the lower courts have had the opportunity to review the law in the context of the evidence at the new trial. Thus, if this Court is desirous of pronouncing upon this question, it will have a better opportunity to do so after a full and complete record is made.

II. THE COURT CORRECTLY HELD THAT LITIGATION EXPENSES, INCLUDING ATTORNEY FEES, ARE RECOVERABLE AGAINST A UNION IN AN UNFAIR REPRESENTATION SUIT.

The leading case is *Czosek* v. *O'Mara,* 397 U.S. 25 (1970) where this Court held:

> "Damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievance added to the difficulty and *expense of collecting from the employer.*" (Emphasis added)

In the case at bar Scott will receive $12,500 as damages from the employer.[3, 4] But Scott incurred considerable expense, including expert witness fees, travel and discovery costs, and attorneys fees, in collecting from the employer. These litigation expenses, incurred in pursuing the claim for wrongful discharge, were directly caused by the union's failure to represent. The legal theory behind the *Czosek* doctrine derives part from the well-settled doctrine that a defendant tort feasor should pay as part of damages any legal fees incurred by plaintiff in an action against a third person when said fees are the proximate result of defendant's wrongful act, 22 *Am. Jur. 2d.* 235, *Damages,* § 166 (1965); 45 A.L.R.2d 1183 (1956). Examples of the theory treating legal fees as consequential damages in the labor context are employer suits against unions under Section 303 (b) of the Labor Management Relations Act for damages caused by illegal secondary boycott activities; *Sheetmetal Workers Local 233* v. *Atlas Sheet Metal Co.,* 384 F.2d 101 (5th Cir. 1967); *Gulf Coast Bldg. and Constr. Trades Council* v. *F. R. Hoar & Son,* 370 F.2d 746 (5th Cir. 1967); *Teamsters Local 984* v. *Humko Co.,* 287 F.2d 231 (6th Cir. 1961), *cert denied,* 366 U.S. 962 (1961). In these cases attorney fees incurred by the employer in having illegal picket lines removed — by court or N.L.R.B. proceedings — were recovered. Thus, it is clear that the inclusion of attorneys fees, as part of consequential damages at law has solid support.[5]

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[3] *Czosek* followed the teaching of *Vaca* v. *Sipes,* 386 U.S. 171 (1967) which held that a union is liable for "increases" in damages over and above those caused by the employer.

[4] The employer has also filed a petition for certiorari, protesting the Court of Appeals decision sustaining the verdict. See *Anchor* v. *Scott,* 74-6.

[5] See also *Vaughn* v. *Atkinson,* 369 U.S. 527 (1962).

The leading case dealing with the subject of attorney fees in unfair representation cases is *DeArroyo* v. *Sinchicato de Trabajordes Packinghouse,* 425 F.2d 281 (1st Cir. 1970), *cert. denied* 400 U.S. 877, where the court noted:

> "Federal courts have awarded attorney fees as a part of the successful plaintiff's recovery in the labor relations context in the absence of express statutory authorization (citations omitted) . . . we are inclined to think that such relief could be appropriate in a § 301 suit such as this one,"

and went on to say in a footnote that:

> "Mr. Justice Black, dissenting in *Vaca* v. *Sipes,* supra at 210, eloquently described the difficult route left open to the employee in this predicament. Moreover, the alleged wrong inflicted on the employee, loss of employment in violation of contractual rights; the anticipated recovery, perhaps too insubstantial to sustain competent counsel's best efforts to obtain a redress; and the ultimate purpose behind any recovery in such a case, making the employee whole, all suggest that the employee may need some financial assistance to press his claim, and if successful, should retain a substantial portion of the jury's 'lost earnings' award for himself. Finally, *the cost of attorneys fees is an injury to the employee directly attributable to and necessitated by the failure of the union and/or the employer to utilize the contractual grievance procedures designed to remedy breach of contract claims without resort to the courts."* (emphasis added)

The leading pre-*Vaca* case sanctioning an award of fees against a union that breached its duty of fair representation is *Rolax* v. *Atlantic Coast Line Ry.,* 186 F.2d 473 (4th Cir. 1951) where the court held:

> "The justification here (for an award of attorney fees) is that plaintiffs of small means have been subjected

> to discrimination and oppressive conduct by a powerful labor organization which was required as bargaining agent to protect their interests."

Following the *Rolax* and *Vaca* decisions, many unfair representation cases have allowed recovery of attorney's fees as a matter of equity, taxing them as costs, *Tischler* v. *Airline Pilots Ass'n*, 57 CCH Lab. Cas. 12,538 (S.D. Fla. 1968), aff'd 59 CCH Lab. Cas. 13,246 (5th Cir. 1968), where the court held:

> "In situations such as this wherein a member of a bargaining unit is pitted against a labor organization in an attempt to correct abuses, the allowance of attorney fees as part of the costs is a matter resting in the sound discretion of the trial judge."

The court in *Local 4706* v. *Steelworkers*, 68 L.C. ¶ 12,645 (W.D. Pa. 1972) held there was a "patent" breach of the duty of fair representation and that "in suits such as the instant one and in appropriate circumstances counsel fees may be awarded" and made an award of $5,000 fee. And in the very recent and as yet unreported wrongful discharge/unfair representation case of *Holodnak* v. *Avco Corp. and Local 1010 UAW*, Civil Action No. B-15, Dist. Ct. D. of Conn., August 15, 1974 (J. Lumbard sitting by designation), the court held it "has the power to award counsel fees despite the absence of express statutory authorization" and that the union's breach of duty "did contribute to plaintiff's need for counsel to assert his rights."

The union argues that counsel fees should be awarded, as a matter of equity, only "when overriding considerations of justice seemed to compel such a result," *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967). We believe that in most unfair representation cases, such overriding considerations are present and addi-

tional considerations such as bad faith and vindication of public policy are factors favoring an award.[6] These policies have been held to apply with equal force to allow recovery of lawyer's fees in suits against a union for the violation of Section 102 of the Labor Management Reporting and Disclosure Act of 1959.[7]

This Court recognized the problems a plaintiff like Scott faces, in the *Hall* case, citing with approval the Court of Appeals decision as follows:

> "Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. It is difficult for individual members of labor organizations to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own . . . An individual union member could not carry such a heavy financial burden. Without counsel fees the grant of federal jurisdiction is but an empty gesture, for few union members could avail themselves of it." *Hall* v. *Cole*, 462 F.2d at 780-781.

In the case at bar, the mysterious disappearance of three of Scott's letters from the union files, the pattern of collusive bad faith representation and union ill-will, and the union's flagrant refusal to process a clearly meritorius grievance are factors making the granting of fees particularly appropriate.

In the normal wrongful discharge case, the union pays all expenses and legal fees of arbitration and the employee

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[6] In addition, unfair representation suits serve as an important instrument for enforcement of Section 8(b)(1)(a) of the Act and generally serve to benefit union members everywhere because of their deterrent effect. Plaintiff's counsel in effect is acting as a private attorney general, *Newman* v. *Piggie Park*, 390 U.S. 400 (1968).

[7] *Hall* v. *Cole*, 412 U.S. 1 (1973).

keeps one hundred percent of any back pay award. In order to accomplish the remedial purposes of the Act, the result in federal court should be the same.[8] The only way to make plaintiff "whole" is to ensure he receives attorney fees and litigation expenses. The National Labor Relations Board in agreement with this principle, has held that where a union is guilty of unfair representation it should pay plaintiff's attorney fees, *Local Unions Nos. 186 et al. Teamsters Union*, 203 NLRB No. 125 (1974). In *N.L.R.B.* v. *Local 485 I.U.E.*, 67 L.C. ¶ 12,371 (2nd Cir. 1972), the court approved the idea of the N.L.R.B. requiring a guilty union to furnish the member with "reasonable legal fees."

It was necessary for plaintiff who resides in Northern Kentucky, to retain a total of six attorneys — not due to his own fault, but because the locus of the trial kept shifting between Cleveland and Youngstown, and because of the difficulties of obtaining out of town co-counsel. It was necessary to retain three expert doctors. There was extensive discovery and pretrial motions, and travel to and from Cincinnati and Northern Ohio by counsel. During the period 1967 to 1972, counsel spent a minimum of 550 hours of work. Unless Scott receives his litigation expenses, he will receive for himself only about 40% of the jury award, after deductions. This Scott case is a further illustration of why all the reported cases favor an award of fees, and none exist, involving unfair representation, which favor defendant's position.[9] Thus, the Court of Appeals decision, remanding this case for a new hearing at which

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[8] The court in *Vaca* encouraged the lower courts to "fashion an appropriate remedy" when a breach of duty is proved.

[9] The union's brief does not cite any unfair representation cases which refute the principles set forth herein or deny the proposition that fees should be awarded.

time plaintiff shall have full opportunity to prove the nature and amount of attorneys fees caused by the union's unfair representation, is in accord with prevailing authority.

III. WHERE A UNION ACTING IN BAD FAITH FAILS TO FILE A MERITORIOUS GRIEVANCE IT MAY BE HELD LIABLE FOR DAMAGES.

Defendant's argument – that plaintiff did not properly exhaust his contract remedies, raises a question of fact which has already been determined by the jury. The jury, after listening to all the evidence, concluded that plaintiff by mailing his grievance to the union within seven days of the discharge, satisfied the contract's requirements. In any event, the union received the grievance within the requisite 10 days. There was ample time for the union to deliver the grievance to the employer's office which was located only a few miles from the union hall. Any technical failure to file with the employer was the fault of the union and not of Scott, who according to the jury acted reasonably in his attempt to exhaust remedies.

There is not one iota of testimony in the record of any union agent claiming that its reason for failing to file the grievance was its untimeliness. To the contrary, union agents at trial denied ever even inspecting the grievance (122-23). The court noted that there was no error in allowing the jury to apply the language of the contract to the facts and determine when the ten day limitation started to run, and to whom the grievance must be given. The jury resolved these and other factual issues related to the exhaustion issue in Scott's favor and the union has cited no principles of law requiring reversal of the jury's factual

determination. According to the contract and the practice, the union, not the employee, has prime responsibility for processing the grievance. Whether or not the employer received a copy of the grievance is, of course, irrelevant to the union's duty in the matter. Even if the employer had been adjudged immune from suit because of the union's failure to exhaust the grievance procedure, the union obviously bore responsibility for those damages caused by such misconduct.

IV. THIS CASE IS INAPPROPRIATE FOR CERTIORARI.

The only reason the trial court refused to grant plaintiff's post trial motion for an award of fees, was its belief that fees already had been granted by the jury as part of damages. When the Court of Appeals reversed the damage award as being too speculative, it was only fair to remand the entire matter of union liability for damages to the lower court for a rehearing. This decision was unique to the particular procedural framework of this case and hardly of great public concern. Whether the lower court will regard the matter of attorneys fees as recoverable as part of damages at law or as a matter of equity is as yet uncertain.[10] It would be premature at this point – when no final order lies against the union – to grant certiorari. If and when there is a final judgment which includes legal fees, the

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[10] There is some ambiguity in the Court of Appeals decision. By reversing the trial court's refusal to grant fees as a matter of equity, it suggests that upon remand the court and not a jury, should determine the matter. But by its language which talks of a remand "with instruction that the amount of damages . . be assessed" the opinion suggests that the rehearing could be before a jury and cover items of damage, in addition to litigation expenses.

lower courts will have adequate opportunity to rule on the many aspects of the issue which have yet to be decided, e.g. method of calculation, amount, factors to be considered, reasonableness of attorneys fees, relevance of any contingency fee contract, whether expert witness and travel expenses are includable, and whether trial by jury is permissible. Only then would the issues become ripe for consideration by this court.

Admittedly there are only a few cases concerning the subject matter of this appeal, because plaintiffs have had very few successes in Section 301 unfair representation litigation. The issue needs further development in the lower courts before review would be appropriate in this Supreme Court. The *Scott* case, with its peculiar unique features and which has yet to proceed to judgment, is hardly the appropriate vehicle for definitive exploration of the problem at this time.

CONCLUSION

This appeal from an order granting a new trial is premature. Furthermore, the court was correct in holding that the union, which was admittedly guilty of bad faith representation, is liable for damages, including expenses of litigation under the doctrines of *Vaca, Czosek* and *Hall.*

For all these reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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